

BANK UTAMA (MALAYSIA) BHD

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v.

CSM CORPORATION BHD

HIGH COURT MALAYA, KUALA LUMPUR

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VINCENT NG J

[CIVIL SUIT NO: D1-22-1034-2001]

2 MAY 2003

CIVIL PROCEDURE: *Summary judgment - Loan facilities - Default in repayment - Triable issues - Whether issues merited full hearing - Counter claim and set-off - Whether there were counter claims and set-off equalling or exceeding plaintiff's claim - Rules of the High Court 1980, O. 14*

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The plaintiff commenced an action against the defendant for failure to service the credit facilities granted by the plaintiff to the defendant. In their statement of defence and counterclaim, the defendant alleged that the credit facilities, which were granted expressly for specific purposes, were misused by the previous directors of the defendant. The defendant further alleged that despite being put to notice as to the misuse of the credit facilities, the plaintiff ignored their duty of care by further facilitating the misuse of the credit facilities to the detriment of the defendant. The plaintiff then filed a summary application pursuant to O. 14 Rules of the High Court. The learned senior assistant registrar dismissed the application. The plaintiff appealed. The issues before the court were (i) whether the loan was for a specific purpose which imposed a duty of care on the plaintiff; (ii) whether there were in existence unusual or peculiar circumstances which turned the plaintiff into a constructive trustee.

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Held (dismissing the appeal):

[1] The issues as raised by the defendant were eminently triable issues and thus the allegations and assertions of the defendant would call for a curial inquiry. There were clearly unusual or anomalous circumstances in the release of the loan that ought to be investigated through the normal process of trial. (pp 80 g-h & 85 d)

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[2] The court would not be exercising its discretion judicially if it were to grant summary judgment with an order that the judgment be stayed until the counterclaim is heard. Further, the counterclaim, which amounts to a set-off, may equal or exceed the plaintiff's claim. (p 85 e-f)

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a Case(s) referred to:

- Amalgamated Investment and Property Co Ltd (In liquidation) v. Texas Commerce International Bank Ltd* [1981] 3 All ER 577 (**refd**)
Bank Negara Malaysia v. Mohd Ismail & Others [1992] 1 CLJ 627 SC (**refd**)
Barclays Bank plc v. Quincecare Ltd & Anor [1992] 4 QBD 363 (**refd**)
Boustead Trading (1985) Sdn Bhd v. Arab Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC (**refd**)
b *Chen Heng Ping & Others v. Intradagang Merchant Bankers (M) Bhd* [1995] 3 CLJ 690 CA (**refd**)
Eushun Properites Sdn Bhd v. MBf Finance Bhd [1992] 3 CLJ 1519 SC (**refd**)
Lin Securities (Pte) v. Noone & Co Sdn Bhd & Anor (No 2) [1989] 2 CLJ 847; [1989] 2 CLJ (Rep) 76 HC (**refd**)
c *Lipkin Gorman (a firm) v. Karpnale Ltd & Anor* [1992] 4 All ER 409 (**refd**)
Miles v. Bull [1968] 3 All ER 632 (**refd**)
Ng Hee Thoong & Anor v. Public Bank Berhad [1995] 1 CLJ 609 CA (**refd**)
Permodalan Plantations Sdn Bhd v. Rachuta Sdn Bhd [1985] 1 CLJ 62; [1985] CLJ (Rep) 242 (**refd**)
d *Raja Zainal Abidin Raja Hj Tachik & Ors v. British-American Life & General Insurance Bhd* [1993] 3 CLJ 606 SC (**refd**)
Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong [1998] 3 CLJ 503 FC (**refd**)
Societe Des Etains De Bayas Tudjuh v. Woh Heng Mining Kongsi [1978] 2 MLJ 267 (**refd**)
Tractors Malaysia Bhd v. Tio Chee Hing [1975] 2 MLJ 1 (**refd**)
e *United Merchant Finance Berhad v. Majlis Agama Islam Negeri Johor* [1999] 2 CLJ 151 FC (**refd**)

Legislation referred to:

Evidence Act 1950, s. 92
 Rules of The High Court 1980, O. 14

f Other source(s) referred to:

Kim Lewison QC, *The Interpretation of Contracts*, Sweet & Maxwell 1997, 2nd edn
For the appellant/plaintiff - RS Nathan (Mohd Izral Khairy); M/s Shearn Delamore
For the respondent/defendant - Gopal Sreenivasan (Shahnaaz Omar); M/s Sivananthan

g Reported by Izzaty Izzuddin**JUDGMENT****Vincent Ng J:**

- h** Before me is the plaintiff's appeal (encl. 22) against the decision of the learned Senior Assistant Registrar, on 6 September 2002, disallowing the plaintiff's application for summary judgment under O. 14 of the Rules of the High Court 1980 (RHC).

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The plaintiff's claim, quite simply, is founded upon two overdrafts and a term loan (credit facilities) granted to the defendant. The defendant failed to service the credit facilities in accordance with the terms agreed upon and the plaintiff alleged that, as at 30 June 2001, the defendant owed a total of RM122,516,025.57.

The defendant in their statement of defence and counterclaim alleged that the credit facilities, which were granted expressly for specific purposes, were misused by the previous directors of the defendant. And that, despite being put on notice as to the misuse of the credit facilities, the plaintiff ignored their duty of care, further facilitating the misuse to the detriment of the defendant. This is the cause of action of the defendant's counter claim and the said credit facilities are also the subject matter of the defendant's suit against its former directors *vide* Originating Summons No: D5-24-8-02 grounded upon alleged breach of fiduciary duties for culpable misuse of the said credit facilities – not for the benefit of the defendant company. The counterclaim (which may equal or exceed the claim) is for:

- (a) the value of the utilised funds, in the sum of RM91,367,528.41;
- (b) interest paid to the account of the credit facilities in the sum of RM18,471,895.40; and
- (c) general damages for breach of contract and negligence.

The law governing applications for summary judgment is well settled. The decider in such applications does not decide the issues at this stage, but rather focuses on two factors, namely the definite and the amorphous. The definite factor being whether there is one or more issues of fact or law that are consistent with the averments and contemporaneous documents which are raised and are triable. See *Ng Hee Thoong & Anor v. Public Bank Berhad* [1995] 1 CLJ 609 CA. The amorphous factor being whether there are unusual or anomalous or curious circumstances pertinent to the issues raised, which, though incapable of precise definition as triable issues, could yet constitute 'some other reason for trial' or cries out for further enquiry or investigation. See *United Merchant Finance Berhad v. Majlis Agama Islam Negeri Johor* [1999] 2 CLJ 151 Federal Court citing *Miles v. Bull* [1968] 3 All ER 632. The onus always rests on the defendant to establish that the issue or issues are triable or that the circumstances merit enquiry. See *Chen Heng Ping & Others v. Intradagang Merchant Bankers (M) Bhd* [1995] 3 CLJ 690 CA and *Bank Negara Malaysia v. Mohd Ismail & Others* [1992] 1 CLJ 627 SC. Likewise, to deny the plaintiff his day in court, in an application under O. 18 r. 19 RHC or inherent

a jurisdiction of the court, it is incumbent upon the defendant to show that the plaintiff's claim is a clear and obvious exercise in vain with no reasonable prospect of success. See *Raja Zainal Abidin bin Raja Hj. Tachik & Ors v. British-American Life & General Insurance Bhd* [1993] 3 MLJ 606 SC and *Tractors Malaysia Bhd v. Tio Chee Hing* [1975] 2 MLJ 1.

b Ideally, a submission to court in such applications should be a brief exercise in clarity (the submission of counsel for the defendant here met, somewhat, this criterion) – a challenging endeavour requiring a good command of language, focus with ability to distil, analytical prowess and a methodical mind; in other words it should be, in common parlance, the product of a beautiful mind. It is of course a well recognised phenomenon that lawyers' submissions have a tendency to get longer – to that of an opus with blurrier focus – that is co-extensive with the diminishing strength of their client's case.

c It is common ground that the defendant was given two credit facilities for the following specific and expressed purposes:

- d* (i) On 26 August 1998, an overdraft of RM45 million (exh. A5 encl. 10) to finance a land development project pursuant to a joint venture agreement with Saujana Pertiwi Sdn Bhd ("Saujana") dated 27 August 1998 ("JV project"); and
- e* (ii) On 30 October 1998, a second overdraft of RM35 million and a term loan of RM40 million to finance the acquisition of five other companies and to be used as working capital for the defendant's core businesses.

f In reply to the defendant's allegation, the plaintiff averred that they were not obliged to question any of the transactions which were in accordance to the defendant's mandate. They maintained that there were no reasonable grounds for believing that the funds were being misused or that the authorised signatories for the defendant were acting in breach of their fiduciary duties.

g I find the following two questions to be triable issues that merit a full hearing: (i) whether the loan was for a specific purpose which imposed a duty of care on the plaintiff; and if so, whether there were reasonable grounds – not mere suspicion or unease – to put them on enquiry; (ii) whether there are unusual or peculiar circumstances of the case which would impose upon the plaintiff the position of a constructive trustee or create a constructive trusteeship. I also find that there are unusual or anomalous circumstances in the release of the loan that ought to be investigated through the normal process of trial.

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On the first issue, the defendant averred in para. 18 of the amended defence and counterclaim (redated 15 October 2001 – encl. 6) that:

... it was an express and/or implied term of the 1st and 2nd Facility Agreements between the Plaintiff as banker and the Defendant company as customer:

- (a) that the Defendant would utilise the Facilities for its proper and specific purpose and in accordance with sound and financial and commercial standards and practices; and
- (b) that the Plaintiff shall observe reasonable skill and care in and about executing the Defendant's orders including but not limited to making proper and necessary inquiries in respect of cheques and transfers drawn on the Defendant's Facilities and other funds in the Defendant's account.

The Law

The law permits terms to be implied, but bars a defendant from seeking to imply terms to contradict express terms. See *Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong* [1998] 3 CLJ 503 FC. Courts are less reluctant to supply the missing terms where the bargain is 'obviously not complete'. (See *Lin Securities (Pte) v. Noone & Co Sdn Bhd & Anor (No 2)* [1989] 2 CLJ 847; [1989] 2 CLJ (Rep) 76.) The law also recognises that, in certain circumstances, "evidence of surrounding circumstances and factual background are admissible" particularly if it does not contradict the main agreement. See *Eushun Properites Sdn Bhd v. MBf Finance Bhd* [1992] 3 CLJ 1519 SC. The doctrine of estoppel is not confined to cases where a representation of fact has been made. In *Boustead Trading (1985) Sdn Bhd v. Arab Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283 FC the Federal Court accepted and affirmed the principle as expressed by Lord Denning in *Amalgamated Investment and Property Co Ltd (In liquidation) v. Texas Commerce International Bank Ltd* [1981] 3 All ER 577, that the estoppel doctrine "is one of the most flexible and useful in the armory of the law" by which justice is done according to the circumstances.

Defendant's Case

It is the defendant's case that the specific purposes fell within the ambit of the term in the loan documents that the purpose of the credit facilities were for 'General Working Capital' and there was no contradiction of that general term. According to the defendant, the fact that the loan documents state 'working capital' when there was evidence that the credit facilities were granted for the specific purposes, would suggest that the loan documents were 'incomplete'. (See *The Interpretation of Contracts* by Kim Lewison QC, 2nd Ed – Sweet & Maxwell 1997.) Alternatively, the defendant submitted that there

a was a collateral contract (a recognised exception (b) to s. 92 of the Evidence Act 1950) that the credit facilities were to be used for specific purposes. And that, as the plaintiff had conducted itself in a manner consistent with the specific purposes for which the facilities were granted (including its own admission in its letter of 2 July 1999), the plaintiff was estopped from contending otherwise.

b **The Law**

On the second issue, the law on constructive trust is that if a person is put on inquiry as to some impropriety, that person will be rendered a constructive trustee and will be liable whether or not there is lack of probity/honesty on its part. The law recognises that each case depends on its own facts; some relevant considerations being, for example, the standing of the customer, the bank's knowledge of the signatory and the presence of unusual features. See *Barclays Bank plc v. Quincecare Ltd & Anor* [1992] 4 QBD 363 at p. 376; *Lipkin Gorman (a firm) v. Karpnale Ltd & Anor* [1992] 4 All ER 409 at p. 439.

d **Defendant's Assertions**

In this regard, the defendant submitted that as the following unusual fact pattern would have put any reasonable banker on inquiry, a constructive trust had been imposed upon the plaintiff:

e (i) By about 29.8.1998, 2 days after the date of the Facilities Agreement for OD Facility I and one day after the date of the JV Agreement, 2 cheques for more than RM21,150,000.00 were drawn out (paragraph 20, and Exhibit 'A 14' Enclosure 9).

f (ii) By 22.9.1998, barely a month after the application for OD Facility I had been made, more than RM34 million was drawn down by the previous directors of the defendant.

(iii) From 23.10.1998 to 20.12.1998 (a period of less than 2 months after the application for OD Facility II and TL Facility), more than RM56 million was drawn down.

g (iv) Cheques (Exhibit 'A 15', Enclosure 9) were issued to parties unrelated to the JV project, the acquisition of the 5 companies and/or parties not forming the core business of the defendant (paragraph 26(b), 27(c) Enclosure 9).

h (v) The defendant informed the plaintiff *vide* their letter dated 8.10.1998 (Exhibit 'A 13', Enclosure 9) that they were not proceeding with the JV project despite so much money had been disbursed.

(vi) The contents of the defendant's letter to the plaintiff dated 7.7.1999 were highly suspicious (Exhibit 'A 19' Enclosure 9) for the reasons as set out

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in paragraph 12(c) Enclosure 11. It is surprising how the plaintiff could have been reassured that all was in order, as they stated in their affidavit.

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- (vii) Two payments were made to parties for purportedly arranging the credit facilities. The plaintiff, though denying knowledge of such payments, had admitted that as a matter of policy, it did not lend itself to arrangements where third parties broker or arrange for facilities (paragraph 24 Enclosure 9, Exhibit 'A 17' Enclosure 9, paragraph 11 Enclosure 13).

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Aside from the niggling thought of why a cash rich company, with about RM180 million in cash and unencumbered group assets of about RM300 million, would take out a huge borrowing, I find the following curious and peculiar scenario put forth by the defendant cries to be investigated. It is alleged that prior to August 1998, the defendant had never operated any banking accounts with the plaintiff, but credit facilities amounting to RM120 million were granted to the defendant, a first time client, without detailed information being asked for or provided to the plaintiff; hence, the huge amounts was released in the manner 'not in the ordinary course of business'. And this, according to the defendant, should have put the plaintiff on enquiry.

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It is common ground that, to give effect to the joint venture, RM20 million of the first facility was utilised to discharge a pre-existing charge on the Saujana land which was created for credit facilities granted by the plaintiff to Perinkon Credit & Leasing Sdn Bhd ("Perinkon"). Whilst this in itself could be considered a normal banking transaction, the court's attention was drawn to several other facts which bear minding, especially the time frame of these transactions; notably, the first facility was granted to the defendant on 26 August 1998, the joint venture agreement was executed on 27 August 1998 and the monies were oddly released by the plaintiff straight to Perinkon on 28 August 1998 (exh. A10 encl. 10).

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The plaintiff was also accused of carrying out the loan disbursements in unholy hurry and dubious manner, which egged or spurred on the defendant's unchecked financial spree. Particularly, between 28 August 1998 to 20 December 1998, the authorised signatories for the defendants, issued 12 cheques amounting to RM91,367,528.41 (exh. A15 encl. 10). These cheques were issued for a myriad of reasons ranging from settlement of purported loans previously given to the defendant, to 'brokerage fees' for arranging the joint venture with Saujana and 'arranger fees' for the credit facilities from the plaintiff. This assertion is consistent with the pleadings, bearing in mind the averment in para. 21(c), (e), (f) and (g) of encl. 6 that:

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- (c) by cheque nos. 118856 and 118857 signed by Gan and Shariff, the Defendant paid the sum of RM5,000,000.00 to Magna Estates Sdn Bhd

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- a* purportedly as brokerage fees for arranging the joint venture between the Defendant and Saujana. The Defendant will *inter alia* contend that Gan and Shariff were in breach of their fiduciary duties to the Defendant as there was no underlying resolution of the board authorising this payment which was not in the ordinary course of business;
- b* (e) by cheque nos. 118858 and 118863 signed by Gan and Shariff, the Defendant paid the sum of RM10,500,000.00 to Quest Shine Sdn Bhd also purportedly by way of a loan. The Defendant will *inter alia* contend that Gan and Shariff were in breach of their fiduciary duties as there was no proper underlying resolution authorising this payment which was not in the ordinary course of business and illegal;
- c* (f) by cheque no. 118860 signed by Gan and Shariff and telegraphic transfer from the Plaintiff to Hongkong & Shanghai Banking Corporation, the Defendant paid the sum of RM4,640,000.00 to one Soong King Fatt, purportedly as arranger fees for the Facilities. The Defendant will *inter alia* contend that Gan and Shariff were in breach of their fiduciary duties as there was no proper underlying resolution authorising this payment which was not in the ordinary course of business;
- d* (g) by cheque no. 118862 signed by Gan and Shariff, the Defendant paid RM9,132,528.41 to Perinkon Credit & Leasing Sdn Bhd, ostensibly by way of a loan. The Defendant will *inter alia* contend that the Previous Directors who authorised this payment were in breach of their fiduciary duties as it was illegal and not in the ordinary course of business;
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As it stands at this stage of the proceedings, considering the gravity of all the defendant's assertions catalogued above, this court cannot brush aside the gravamen of the defendant's complaint or charge against the plaintiff, spelt out in para. 22 of encl. 6 which reads:

- f* 22. The Plaintiff as reasonable bankers had reasonable grounds for believing between, in or about August 1998 to in or about December 1998, that Gan and Shariff and/or some other previous directors were operating the Defendant's Facilities and account in breach of their fiduciary duties, and in continuing to pay on cheques and accept transfers without enquiry, the Plaintiff was negligent and in breach of contract.
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Thus, the very pith and kernel of the defendant's complaint was that there were anomalous circumstances in the disbursements of the credit facilities which stuck out like the proverbial sore thumb, as the aforesaid cheques were not issued in the defendant's ordinary course of business or as working capital or for the specific purpose that it was intended. And, that despite the fact that the defendant was utilising staggering amounts of the credit facilities for purposes

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totally unconnected to the specific purposes the monies were to be provided, the lackadaisical plaintiff paid out on the cheques without any enquiry. It is further contended that the time frame within which these transactions occurred and the amount of monies involved would have alerted any reasonable banker that all was not well, especially when considered in conjunction with the fact that the plaintiff had been notified as early as October 1998 (exh. 'A13' encl. 9), that the defendant would not be proceeding with the joint venture with Saujana. Thus, asks the defendant, could this, despite having paid out about half the credit facilities allotted for the joint venture, have failed to put the plaintiff on enquiry, when reasonable and established banking practices should have served to prevent such blatant misuse; and, the fact it did not, only lends credence to the defendant's allegation that the plaintiff were in breach of their fiduciary duties to the defendant.

In my considered judgment all the above allegations and assertions certainly call for curial enquiry, as the issues raised are eminently triable, though I must hasten to add that, when considered in the light of *viva voce* evidence, the plaintiff may yet have a cogent explanation for all the above apparently anomalous circumstances surrounding the credit facilities. Consequently, after having carefully read all 7 affidavits, pleadings and submissions from both sides, I dismissed the plaintiff's appeal in encl. 22 with costs.

Lastly, the defendant's counterclaim was as intimately related to the plaintiff's claim as Tweedledee and Tweedledum, such that I would not be exercising my discretion judicially had I granted summary judgment to the plaintiff, with an order that the judgment be stayed until the counterclaim is heard. Further, the counterclaim, which amounts to a set-off, may equal or exceed the plaintiff's claim and therefore there is no 'difference' in respect of which a judgment can be entered. It is also to be noted that there is no issue of double-recovery by the defendant as the counterclaim is pleaded as a set-off and the defendant does not seek payment of the sum claim. See *Permodalan Plantations Sdn Bhd v. Rachuta Sdn Bhd* [1985] 1 CLJ 62; [1985] CLJ (Rep) 242; *Societe Des Etains De Bayas Tudjuh v. Woh Heng Mining Kongsu* [1978] 2 MLJ 267.